No. 80-1452

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In the Supreme Court of the United States

OCTOBER TERM, 1980

SAHARA-TAHOE CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. Petitioner operates a hotel, bar, restaurant and casino in Stateline, Nevada (Pet. App. 13). In May 1970, the Hotel, Motel, Restaurant Employees and Bartenders Union Local No. 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO ("the Union") was certified as the collective bargaining representative of petitioner's service employees (Pet. App. 14). Thereafter, in 1970 and 1973, petitioner and the Union entered into successive three year collective bargaining agreements (Pet. App. 14). In September 1976, the Union notified petitioner that it desired to modify the contract that was due to expire November 30, 1976. Petitioner indicated its willingness to meet with the Union for that purpose. On November 29, the Union sent petitioner its contract proposals with a request that bargaining negotiations commence. On December 16, petitioner wrote to the Union expressing doubt that the Union "currently represents a majority of any employees at the Sahara-

Tahoe Hotel in an appropriate unit" and refusing to bargain for that reason (Pet. App. 14-15).

The Board, upholding the decision of the administrative law judge, found that petitioner did not have a sufficient objective basis for reasonably doubting the Union's continued majority status and that therefore petitioner violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by withdrawing recognition from and refusing to bargain with the Union (Pet. App. 8-9, 35).

In rejecting petitioner's assertion of a good faith doubt of the Union's continuing majority status, the administrative law judge noted that petitioner relied on a number of factors that previously had been considered and rejected by the Board when raised by petitioner and a number of other casino owners in the Lake Tahoe area with regard to the Union's status as majority representative of their kitchen and culinary employees (Pet. App. 27).[1]

The administrative law judge also rejected petitioner's reliance on a petition that employee Wolchow attempted to file with the Board in an effort to decertify the Union. The judge explained (Pet. App. 32-33):

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[1]The factors rejected by the Board include the Union's having been placed under trusteeship, the Union's activity in attempting to increase its membership, the lack of grievance activity by the Union, high employee turnover, and closure of the Union's Lake Tahoe office. These factors were also asserted in *NLRB* v. *Silver Spur Casino*, 623 F. 2d 571 (9th Cir. 1980), petitions for cert. pending, sub nom. *Silver Spur Casino* v. *NLRB*, No. 80-660 (filed Oct. 11, 1980) and *Barney's Club, Inc.* v. *NLRB*, No. 80-1083 (filed Jan. 2, 1981), and are discussed in the Board's briefs in opposition to the petitions in those cases. (We are sending counsel for petitioner copies of our briefs in opposition in *Silver Spur* and *Barney's Club*.) See also *Sahara-Tahoe Corp.* v. *NLRB*, 581 F. 2d 767 (9th Cir. 1978), cert. denied, 442 U.S. 917 (1979); *NLRB* v. *Tahoe Nugget, Inc.*, 584 F. 2d 293 (9th Cir. 1978), cert. denied, 442 U.S. 921 (1979); *NLRB* v. *Sierra Development Co.*, 604 F. 2d 606 (9th Cir. 1979); *NLRB* v. *Carda Hotels, Inc.*, 604 F. 2d 605 (9th Cir. 1979).

> Of significance in making a determination whether the document signifies a rejection of the Union as their collective-bargaining representative, is the legend written at the top, which reads: "The undersigned are employees of Sahara-Tahoe Hotel, who do not want to *belong* to any culinary union." (emphasis added.) The [petitioner's] contention with respect to the meaning of the document fails to distinguish between wanting to be a union member, and desiring to have union representation. * * * Nevada is a "right to work" state. Hence, contrary to the [petitioner's] contention that the document represents a rejection of the Union's representative status, the signatures affixed thereto may more logically be taken as an indication that the employees are voicing their right under state law not to *belong* to a union. In any event, a decertification petition was not in fact filed, nor do the signatures of slightly more than 30 percent of the employees indicate a rejection of the Union by a *majority* of the employees.

The administrative law judge added that petitioner's reliance on Wolchow's statement that 150 employees told him that they all wanted to withdraw from the Union was not probative of actual employee sentiment. The judge noted that "Wolchow is the only employee who expressed employee sentiments to [petitioner's] executives. His sentiments, insofar as they purport to convey the sentiments of other employees, are entitled to little, if any, weight" (Pet. App. 34).

The Board ordered petitioner, *inter alia*, to bargain with the Union (Pet. App. 8-9, 36-38).

2. The court of appeals, finding that substantial evidence supported the Board's decision, enforced its order (Pet. App. 1-7). The court noted that in its "prior 'casino cases' " (see note 1, *supra*), it had agreed with the Board that

evidence of "employee discontent with the union, high employee turnover, low union membership, financial difficulties of the union, and a vigorous membership drive * * * standing alone or cumulatively, presented only an ambiguous inference that the union had lost its majority support" (*id.* at 2-3). The court further agreed with the Board that the decertification petition was ambiguous and therefore "did not, by itself or together with the other evidence presented, unequivocally indicate that the union support had declined to a minority" (*id.* at 6).

3. Petitioner contends that the court of appeals erred in upholding the Board's position that petitioner did not have a good faith, reasonable doubt of the Union's continued majority support of its service employees. Petitioner essentially contends (Pet. 11) that the court of appeals applied a more stringent standard than have the other circuits in assessing the reasonableness of an employer's basis for asserting a good faith doubt and that the court below failed to consider the cumulative effect of the evidence. There is no merit to these contentions.

Petitioner focuses (Pet. 11-12) on the court of appeals' statement that the evidence did not "unequivocally indicate that the union support had declined to a minority" (Pet. App. 6-7), and points to opinions in other circuits describing the reasonable doubt test by such phrases as "serious doubt," "rational basis" and "clear and convincing evidence" (Pet. 12-13). However, the court's use of the term "unequivocal" was in response to the fact that petitioner's evidence was ambiguous because it indicated only that the employees might not want to be *members* of the Union rather than that they did not want the Union to be their bargaining representative. In none of the cases upon which petitioner relies did the courts accept evidence of a decline

in interest in union membership, rather than union representation, as adequate to support a good faith doubt of continuing majority status.[2]

Moreover, contrary to petitioner's assertion (Pet. 14-19), the court of appeals did consider the cumulative weight of the evidence (Pet. App. 3, 6). Thus, the only issue actually presented here is whether substantial evidence supports the Board's finding of insufficient objective factors to support a good faith doubt of loss of majority status. That factual issue does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

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[2]In *NLRB* v. *Frick Co.*, 423 F. 2d 1327, 1333-1334 (3d Cir. 1970), the court agreed with the Board that the employer could not establish a good faith doubt based on the fact that a number of employees had abandoned a strike. In *Terrell Machine Co.* v. *NLRB*, 427 F. 2d 1088, 1090 (4th Cir. 1970) and *Retired Persons Pharmacy* v. *NLRB*, 519 F. 2d 486, 490 (2d Cir. 1975), the courts agreed with the Board that evidence of less than majority union membership could not support a good faith doubt; and, in *J. Ray McDermott & Co.* v. *NLRB*, 571 F. 2d 850, 859 (5th Cir.), cert. denied, 439 U.S. 893 (1978), the court rejected lack of organizational strength and turnover as grounds for establishing a sufficient doubt. In *Lodges 1746 & 743, Machinists Union* v. *NLRB*, 416 F. 2d 809, 812-813 (D.C. Cir. 1969), the union admitted that it lacked majority support. *Automated Business Systems* v. *NLRB*, 497 F. 2d 262, 265 (6th Cir. 1974) and *Royal Typewriter Co.* v. *NLRB*, 533 F. 2d 1030, 1036 (8th Cir. 1976), involved decertification petitions not couched, as here, in terms of union membership. *NLRB* v. *Randle-Eastern Ambulance Services, Inc.*, 584 F. 2d 720, 728-729 (5th Cir. 1978), involved a strike in which the employer had been informed by a union representative that a large number of the strikers would not be returning to work. *NLRB* v. *West Sand & Gravel Co.*, 612 F. 2d 1326 (1st Cir. 1979), did not involve the issue of whether the employer had a good faith doubt, but whether, on the facts of that case, the presumption of majority status was applicable. *Ingress-Plastene, Inc.* v. *NLRB*, 430 F. 2d 542 (7th Cir. 1970) and *W & W Steel Co.* v. *NLRB*, 595 F. 2d 934 (10th Cir. 1979), are discussed in the Board's briefs in opposition in *Silver Spur* (at 8 n.3, 9) and *Barney's Club* (at 8-9).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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